No. 89-1942 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1990

HERMAN BLOOM and HERBERT K. FISHER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a court order authorizing the extension of previously authorized electronic surveillance was "insufficient on its face" under 18 U.S.C. 2518 (10) (a) (ii) because one page of the proposed order was missing from the package when the judge signed the order.

2. Whether petitioner Bloom was improperly convicted of aiding and abetting the payment of a kickback to influence the operation of an employee welfare benefit plan, in violation of 18 U.S.C. 1954, without proof that he took any steps to demonstrate his willful participation in the crime.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Statutes—Continued:

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OPINIONS BELOW

The opinions of the court of appeals affirming petitioners' convictions (Pet. App. A1-A14) are not yet reported, but are noted at 898 F.2d 142 and 143 (Table). The opinion of the district court denying petitioners' motions to suppress (Pet. App. A18-A29) is upreported. The opinion of the district court denying petitioners' motions to dismiss the indictment is reported at 692 F.Supp. 495, and the opinion of the court of appeals dismissing the interlocutory appeal from that decision is reported at 871 F.2d 444.

JURISDICTION

The judgments of the court of appeals were entered on February 8, 1990. A petition for rehearing was denied on March 13, 1990. The petition for writs of certiorari was filed on June 11, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 23, 1986, an indictment was returned in the Eastern District of Pennsylvania, charging petitioners and 17 others with racketeering (18 U.S.C. 1962(c)), racketeering conspiracy (18 U.S.C. 1962(d)), embezzling from a union welfare benefit plan (18 U.S.C. 664), and paying kickbacks to influence the operation of an employee welfare benefit plan (18 U.S.C. 1954).

On May 14, 1987, the case against petitioners Bloom and Fisher was severed. An eight-count superseding indictment, charging petitioners alone, was returned on January 21, 1988. Petitioners were charged with one count each of racketeering and racketeering conspiracy (Counts 1 and 2), paying a kickback to union officials to influence the operation of an employee welfare benefit plan (Count 3), and embezzling from a union welfare benefit plan (Count 6). Petitioner Fisher was also charged with two additional counts of paying kickbacks (Counts 4 and 5) and two additional counts of embezzling from a union welfare benefit plan (Counts 7 and 8).

Following a jury trial, petitioners were convicted on the one kickback count in which they were jointly charged (Count 3). They were acquitted on all other charges. Petitioners were each sentenced to terms of imprisonment of one year and one day. In addi-

tion, petitioner Fisher was fined $125,000, and petitioner Bloom was fined $25,000. The court of appeals affirmed. Pet. App. A1-A14.

The evidence at trial is summarized in the opinions of the court of appeals. Pet. App. A2-A3, A9-A10. Petitioners were partners in the law firm of Bloom, Ocks and Fisher. Petitioners' law firm was retained as the sole provider of legal services to eligible members of a welfare benefit plan operated on behalf of Roofers Union Locals 30/30B. The plan, which was funded pursuant to a collective bargaining agreement between the union and an association of roofing contractors, paid the law firm a fixed monthly amount. Petitioners were alleged to have participated in a ten per cent kickback of funds from the law firm to representatives of the plan for use in bribing local officials.

The evidence against petitioners grew out of a court-authorized electronic surveillance order, pursuant to which the FBI monitored conversations in the office of a union official and plan trustee and in the business agents' meeting room at the union hall. At petitioners' trial, the government relied on tapes of 33 conversations to show that petitioner Fisher unlawfully gave union officials ten per cent of the compensation that the plan paid to Bloom, Ocks and Fisher in 1983, 1984, and 1985. Petitioner Bloom was shown to be involved in the 1985 payment. The evidence against Bloom consisted mainly of intercepted conversations among Bloom, Fisher, and Stephen Traitz, Jr., a union official and trustee of the plan. Pet. App. A3, A10.[1]

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[1] Other conversations recorded by the FBI pursuant to court order resulted in the conviction of union officials for offenses including racketeering, mail fraud, solicitation of kickbacks,

ARGUMENT

1. Petitioners contend (Pet. 12-22) that the courts below erred in failing to suppress certain electronic surveillance evidence. The evidence should have been suppressed, they argue, because one of the court orders authorizing the electronic surveillance was facially insufficient.

Electronic surveillance was first authorized in an order dated September 23, 1985, which authorized federal agents to conduct surveillance for a period of 30 days. Pet. App. A18. The order was issued pursuant to the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C, 2510 *et seq.* A second order, signed on October 24, 1985, authorized a 30-day extension of the electronic monitoring,[2] Petitioners argue that the October 24 order was facially insufficient under 18 U.S.C. 2518(10)(a)(ii) because a page was missing from the proposed order when it was signed by the authorizing judge. Pet. App. A21.

Both the district court and the court of appeals found that the absence of one page from the signed copy of the electronic surveillance order did not render the order invalid. The court of appeals relied on its previous decision upholding the validity of the same order, which was also challenged by petitioners' co-defendants. Pet. App. A11; *United States* v.

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embezzlement, bribery, extortion, and loan-sharking. See *United States* v. *Traitz*, 871 F.2d 368 (3d Cir.), cert. denied, 110 S. Ct. 78 (1989).

[2] As the court of appeals noted (Pet. App. A11), the most important evidence relating to the 1985 kickback consisted of recordings of meetings that occurred in November 1985, during this 30-day extension period.

Traitz, 871 F.2d 368 (3d Cir. 1989). This Court denied a petition for a writ of certiorari raising the same issue that is raised in this case. *Traitz* v. *United States*, cert. denied, 110 S. Ct. 78 (1989).

The missing page was page three of the October 24, 1985, extension order. The page was omitted, apparently through inadvertence, from the copy of the proposed order that was submitted to the authorizing judge for signature. As the district court explained in its memorandum denying petitioners' motions to suppress (Pet. App. A21-A23), the absence of that page from the order meant that the order did not contain language reflecting two of the findings the authorizing judge was required to make under 18 U.S.C. 2518(3): a finding that normal investigative procedures had been tried and had failed or appeared to be unlikely to succeed; and a finding that there was probable cause to believe that the facilities from which, or the place where, the communications were to be intercepted were being used or were about to be used in connection with the commission of the specified offense. 18 U.S.C. 2518(3)(c) and (d).

The district court determined that the absence of a written recitation of the two required findings did not invalidate the order, because the court could determine that the authorizing judge had made those findings, and because there was no requirement that the findings be set out in writing. Pet. App. A22-A26. The district court noted that the authorizing judge's signature on the order was an indication that he had considered the application and supporting affidavits for an interception order. Moreover, the October 24 surveillance order stated that the court had given "full consideration . . . to the matter set

forth" in the application, and that the application had been made to the court under oath by the Assistant United States Attorney. Pet. App. A23.

The court of appeals affirmed. Referring to its previous consideration of the same issue in *United States* v. *Traitz*, *supra*, the court of appeals reiterated its conclusion that an electronic surveillance order is valid where, as here, an examination of the supporting documentation supports the conclusion that the authorizing judge made all the findings required by the statute. Pet. App. A11.

In its opinion in the *Traitz* case, the court of appeals first determined, as had the district court, that nothing in the statute requires that the findings mandated by 18 U.S.C. 2518(3) must be in writing. 871 F.2d at 376-377. That conclusion is consistent with the case law on the point, and petitioners cite no contrary authority. See *United States* v. *Martinez*, 588 F.2d 1227, 1233 (9th Cir. 1978) (judge not required to make specific findings of fact under 18 U.S.C. 2518(3)); *United States* v. *Tortorello*, 342 F. Supp. 1029, 1036 (S.D.N.Y. 1972) (Section 2518 (3)(c) does not require that particular words be used in the finding or that the finding be expressed in words rather than by the act of the judge), aff'd, 480 F.2d 764 (2d Cir.), cert. denied, 414 U.S. 866 (1973); *United States* v. *Escandar*, 319 F. Supp. 295, 304 (S.D. Fla. 1970) ("Section 2518(3) requires only that the authorizing judge make a determination that normal investigative procedures have been tried [or] appear likely to fail. There is no specific mandate that such determination be reflected in the written order.").

The court of appeals further concluded that the authorizing judge's act of signing the order was

sufficient evidence that the judge made the findings required by the Act, in light of the supporting documentation for the order, which was concededly proper and complete. 871 F.2d at 377-378; see *United States* v. *Martinez*, 588 F.2d at 1233; *United States* v. *Armocida*, 515 F.2d 29 (3d Cir.), cert. denied, 423 U.S. 858 (1975). Petitioners complain (Pet. 14, 17) that the absence of one page from the order is a conclusive indication that the reviewing judge did not read the order and so could not have made the kind of judicial findings the statute requires. As the court of appeals stated, however, it is not the order that must be examined in order to determine whether the judge properly performed his function under the statute, but the application and affidavit that were submitted in support of the order. 871 F.2d at 378; *United States* v. *Ford*, 553 F.2d 146, 165-166 (D.C. Cir. 1977).

The other four interception orders in this case, all of which were conceded to be valid, set forth in writing each of the findings required by Section 2518(3). After examining those orders, the court of appeals concluded that the supporting documentation must be consulted in any case in order to review the propriety of the district court's approval of the wiretap application. The court of appeals explained (871 F.2d at 377-378):

> In each of these four orders the district court's findings simply tracked the language of § 2518 (3)(a)-(d). Such bald recitations do little to aid this Court in assessing the propriety of the district court's order. Instead, requiring the district court to set forth its findings in writing would promote form over substance and would create a requirement, amounting to a trap for

the unwary, where none was apparently on the mind of Congress.

Petitioners' reliance on this Court's decisions in *United States* v. *Giordano*, 416 U.S. 505 (1974), and *United States* v. *Chavez*, 416 U.S. 562 (1974), is misplaced. As the court of appeals pointed out in its opinion in *Traitz*, those cases referred to the findings the judge must make under Section 2518(3), but neither case addresses the question whether those findings must be made in writing. *United States* v. *Giordano*, 416 U.S. at 514; *United States* v. *Chavez*, 416 U.S, at 564.

Nor does this Court's recent decision in *United States* v. *Ojeda Rios*, 110 S. Ct. 1845 (1990), aid petitioners' argument. In *Ojeda Rios* the Court was called upon to interpret language in 18 U.S.C. 2518 (8)(a) referring to the requirement that the products of court-authorized electronic surveillance be sealed immediately or that a "satisfactory explanation" be provided for the absence of such a seal. The Court concluded that the statutory language required a "satisfactory explanation" of delays in sealing as well as the absence of the required seal. In this case, by contrast, there is no statutory language mandating that the authorizing judge make in writing the findings required by Section 2518(3). In this case, unlike in *Ojeda Rios*, there is therefore no argument available to petitioners that there has been a violation of the explicit terms of the Act.

Contrary to petitioners' assertion, there is no conflict between the decision in this case and the decision of the Sixth Circuit in *United States* v. *Lamonge*, 458 F.2d 197, cert. denied, 409 U.S. 863 (1972). The court in that case found that undated wiretap orders were invalid on their face, but there

the omission in the authorization fell afoul of a specific requirement in 18 U.S.C. 2518(4)(e), *i.e.*, that the surveillance order shall specify "the period of time during which such interception is authorized." Here, the omission in the order did not result in a failure to comply with any of the dictates of the statute.

Petitioners also argue (Pet. 18-22) that the decision of the court of appeals in this case is contrary to the Fourth Amendment, because it amounts to holding that there need be no detached scrutiny of a warrant application by a neutral magistrate, only blind acceptance by the judge of the prosecutor's judgment. Petitioners, however, base that argument on their conclusion that the omission of a page from the extension order shows the issuing judge could not have read the order, and on their further conclusion that the judge therefore did not review the surveillance application. Both courts below found no basis for such a conclusion. Instead, they found sufficient evidence from an examination of all the circumstances in the case that the judge did in fact perform the required review. As the court of appeals concluded, there was no basis in this case for finding that the district court " 'rubber stamped' the government's request without exercising its independent judgment." *United States* v. *Traitz*, 871 F.2d at 378.

2. Petitioner Bloom claims (Pet, 22-24) that the court of appeals erred in finding the evidence sufficient to support his conviction for payment of a kickback. He claims that the court of appeals affirmed his conviction on an agency theory, which was not included in the jury instructions, and that the evidence did not establish that he engaged in the kind of conduct necessary to constitute aiding and abetting.

In the portion of its opinion concerning the sufficiency of the evidence against Bloom, the court of appeals described a meeting that occurred on November 21, 1985, among Bloom, Fisher, and Traitz. The court found that the main topic of the conversation was the payment of a kickback, and it noted that Fisher's use of the words "we" and "us" supported a conclusion that "Fisher spoke on behalf of Bloom when he acknowledged having paid money to Traitz previously during the year and promised to continue the payments." Pet. App. A6. The court further noted that Bloom asked Traitz if he had had his office checked for electronic surveillance devices, and that the inference could be drawn "that Bloom had made two previous efforts to discuss the kickback." *Ibid.* Finally, at the end of the conversation, the court stated, Traitz again asked for the kickback, From this evidence, the court found, "the jury properly could have determined that Fisher and Bloom acted in concert and that the recorded payments made on December 3 and 17, 1985 were made on behalf of both defendants." *Ibid.*

From this review of the evidence, petitioner contends that the court of appeals improperly upheld his conviction based only on his presence and guilty knowledge. Petitioner's argument, however, ignores the nature of the evidence against Bloom, and it misinterprets the findings of the court of appeals. Bloom's participation in the November 21 conversation showed more than just guilty knowledge of Fisher's payment of kickbacks; it showed Bloom's own involvement in those payments. Fisher and Bloom spoke in tandem about the kickback and when it would be paid, finishing each other's sentences as they explained when they expected to complete the

payment, C.A. App. 248a. Fisher continued, explaining the amounts that he said "we" had paid Traitz before and how they would make the remaining payments: "And we'll make up, between now . . . It'll take us two weeks, part next week, part the week after." C.A. App. 249a. When the court of appeals described the evidence as showing that petitioners "acted in concert" and that the payments "were made on behalf of both defendants," Pet. App. A6, it was not suggesting that Bloom was guilty of the substantive offense only by virtue of his participation in a conspiracy, or that he was merely aware of actions taken by Fisher alone. Rather, the court clearly meant that Bloom revealed in the recorded conversation that he was an active partner in the substantive offense of paying the kickback, and that he and Fisher were acting together to make the payments. The finding of the court of appeals was consistent with the evidence presented at trial, the jury instructions, and the law on aiding and abetting.

CONCLUSION

The petition for writs of certiorari should be denied.

Respectfully submitted.

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